IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 584 OF 2007

IN

SPECIAL CIVIL SUIT NO.123 OF 2007

Shri Harbanssingh G. Siddhu .. Appellant

(Orig.Plaintiff)

V/s

1. Smt.Yashodhara Madhav Kamat
2. City and Industrial Development Corporation
3. Navi Mumbai Municipal Corporation .. Respondents

(Orig.Defendants)

S/Shri A.K. Abhyankar with Pramod Patil for the Appellant

Shri A.Y. Sakhare i/b. Sandesh Patil for Respondent No.1

G.S. Hegde i/b. M/s. G.S. Hegde and Associates for Respondent No.2

CORAM : S.R. SATHE,J.

DATED : 21th September, 2007

P.C. :-

1. The Appellant-original Plaintiff in Special Civil Suit No.123 of 2007 has preferred this appeal against

the order passed by the Court of Civil Judge, Senior Division Thane below Exhibit-5 in the said suit whereby the Plaintiff's application for temporary injunction restraining the defendant No.1 from dealing with, creating any third party interest in the suit property was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

3.Brief facts giving rise to this appeal are as under :-

. The Plaintiff is doing business as a developer and real estate agent. The lands bearing Survey No.237, 208/3, 208/5, 209/5, 110, 244, 238 and 239 etc. totally admeasuring 269394 sq meters situated at village Shahabad, Belapur, Navi Mumbai, District Thane were owned by one Vyankatrao Manjunath Kaikani. A notification under section 4 of the Land Acquisition Act was published in the Government Gazette on 4.2.1970 regarding acquisition of the above mentioned lands. When the proceedings with regard to acquisition were pending, Dr. Vyankatrao Kaikani died intestate leaving behind him his widow Ahilyabai and four daughters including the defendant No.1 as legal heirs.

4. Out of the legal heirs of Dr. Vyankatrao Kaikani, his wife Ahilyabai expired on 12.03.1981 while his other

daughter by name Pratibha expired on 17.9.1978. All the benefits in respect of acquired land devolved upon surviving three daughters equally. Due to compulsory acquisition of the lands, the Government of Maharashtra decided to allot compensation in terms of money as well as provide alternate land on concessional rate equivalent to 12.5% of the acquired land. Thus, according to that scheme the defendant No.1 was to get an area of about 3600 sq.meters in Sector-31, Navi Mumbai.

5. The plaintiff came to know that the defendant no.1 will be allotted the land as mentioned above and that the defendant no.1 is interested in assigning the rights in the land that will be allotted to her. Plaintiff therefore approached the defendant no.1 and after discussion plaintiff and defendant no.1 executed memorandum of understanding (MOU) dated 17-11-1996 whereby the defendant no.1 agreed to transfer all the rights, title and interest in the said property for total consideration of Rs.2,16,00,000/- to plaintiff. The plaintiff paid Rs.25,00,000/- to the defendant no.1 being earnest money/part payment towards the said MOU. The defendant no.1 agreed that she will not transfer or assign the suit property to anyone else and would not create any third party right. When the process of allotment was in progress Laxmibai Budhaji Koli filed suit against the defendant no.1 bearing Suit NO.117 of

1999 in the Court of the Civil Judge,S.D., Thane claiming rights over the suit plots and claimed the entitlement of allotment of land under 12.5% Scheme against defendant no.1 and others. The Plaintiff, therefore, got doubt about the title of the defendant no.1 to the suit property. However, the said suit was dismissed and the appeal filed by Laxmibai Budhaji Koli in the District Court at Thane was also dismissed on 19-2-2002. According to the plaintiff he thereafter paid lease premium of Rs.1,40,000/- to the defendant no.2 on behalf of the defendant no.1. Thereafter plaintiff executed MOU with M/s Sahara India Commercial Corporation and the said Sahara Corporation Thane in fact filed Suit NO.416 of 2001 against the defendant no.4 but the said suit was settled by plaintiff by paying Rs.72,35,000/- to Sahara Corporation. According to the plaintiff on 11-11-2006 he forwarded pay order for Rs.29,00,000/- to the defendant no.1 as per the terms and conditions of the agreement/MOU but the defendant no.1 refused to accept the said amount. The plaintiff, therefore, filed present suit for specific performance of MOU dated 17-1-1996 and also prayed for permanent injunction restraining defendant no.1 from creating third party interest in the suit property.

6. The plaintiff also filed an application for temporary injunction Exh.5 and prayed that the defendant no.1 be restrained from creating third party right in

respect of the suit property till the disposal of the suit.

7. The said application was opposed by the defendant no.1 by filing reply. The defendant no.1 contended that there was no concluded contract between the plaintiff and the defendant no.1 and MOU dated 17-1-1996 is in fact the agreement to execute further agreement. He therefore contended that the plaintiff is not entitled for the specific performance of MOU. Besides this the defendant contended that the plaintiff has suppressed the material fact regarding the order passed by the High Court of Bombay in Writ Petition NO.8179 of 2004 and obtained exparte interim order in his favour and as such plaintiff has not approached the court with clean hands and as such he is not entitled for discretionary relief of temporary injunction.

8. According to the defendant no.1 the plaintiff has purported to assign the rights and liability under MOU to Bhoomiraj Homes Pvt. Ltd. and they had filed Special Civil Suit No.608 of 2007 in which present plaintiff and defendant no.1 were parties. However, the plaintiff also suppressed this fact. The defendant no.1 further contended that as per the terms and conditions of MOU the plaintiff had agreed to pay some of Rs.29 lacs within 15 days from obtaining heirship certificate or within 75 days after the execution of MOU whichever

event occurs earlier. Accordingly, defendant obtained heir ship certificate on 16-1-1997 but plaintiff failed to pay amount of Rs.29 lacs in spite of various reminders were sent by the defendant no.1 to him. Thus, the defendant no.1 contended that plaintiff was not ready and willing to comply his obligations under the MOU and as such he is not entitled for temporary injunction.

9. The defendant also contended that in the suit which was filed by Sahara Corporation in the year 2001 the defendant no.1 had made it clear that she has refused to abide by MOU dated 17-1-1996. The plaintiff was aware of the same even then the plaintiff did not file suit for specific performance within 3 years from the said period and hence the suit is bared by law of limitation. The defendant also contended that the plaintiff has not made out any prima facie case for granting temporary injunction as prayed.He also contended that by way of alternative relief plaintiff has claimed damages of Rs.15,64,40,400/- and hence the plaintiff is not entitled for any injunction as prayed. The defendant no.1 therefore prayed for dismissal of the application.

10. After hearing the arguments of both the learned Advocate and considering the documents produced on record the learned trial Judge came to the conclusion that the plaintiff has failed to comply the terms and

conditions of MOU in question and has thus failed to make out any prima facie case. He, therefore, rejected the plaintiff's application.

11. The above mentioned order is challenged by the plaintiff in the present appeal. In this appeal before me Shri A.K.Abhayankar, learned Senior Advocate for the Appellant has urged 3 points. Firstly, he submitted that the suit agreement in question is not only an agreement to develop but it is also an agreement whereby the defendant no.1 agreed to sale the land and as such the plaintiff is entitled to file specific performance of the said agreement. Secondly,he canvassed before me that though the plaintiff has not paid the amount of Rs.29,00,000/- within the time mentioned in the MOU still there is sufficient material on record to show that even thereafter the defendant no.1 had kept the MOU in question alive and thus non payment of rs.29 lacs in time has been condoned by the defendant no.1. Besides this he also submitted that the plaintiff has paid amount of Rs.1,40,376/- to CIDCO on behalf of the defendant no.1 on 19-1-2007 so plaintiff is entitled to seek temporary injunction against the defendant when it appears that the defendant no.1 is trying to create third party interest in the suit property. Lastly, he submitted that at the most the plaintiff can be put to terms but in order to protect his interest it is necessary to grant temporary injunction as prayed. As

against this, Shri A.Y.Sakhare, learned Senior Advocate for the defendant no.1 supported the order passed by the learned trial Judge and submitted that there is no material to show that plaintiff has in fact failed to observe the terms and conditions of the said MOU and as such he is not entitled to file any suit for specific performance. He also submitted that plaintiff has not come to the court with clean hands. He has suppressed material facts and has tried to mislead the Court by making an attempt to show that even recently there was fresh MOU whereby the defendant no.1 had agreed to abide by the said MOU by accepting Rs.20 lacs more, though in fact no such agreement has been executed by the defendant no.1. The learned Advocate therefore submitted that plaintiff has failed to make out any prima facie case and order passed by the trial Judge is legal and correct. He, therefore, submitted that the appeal be dismissed.

12. It is not in dispute that the suit land was to be allotted to the defendant no.1 and as such plaintiff and the defendant no.1 executed said MOU. Though there appears to be some dispute about the exact date on which the said MOU was executed, it has no importance because both the parties have admitted the terms and conditions of MOU in question and execution thereof. It is also not in dispute that at the time of execution of MOU the defendant no.1 had received amount of Rs. 25 lacs from

the plaintiff and further payment of rs.29 lacs was to be made after defendant no.1 submitted certificate regarding heirship or within 75 days from execution of MOU, whichever occurs earlier. It is also not in dispute that amount of Rs.29 lacs was not paid by the plaintiff within the above mentioned stipulated time. So, one thing is certain that the plaintiff has committed breach of said agreement regarding payment of Rs.29 lacs and thus he has committed default.

13. It is true that though plaintiff had not made the payment within the above mentioned time and had thus committed breach of the said terms still the defendant no.1 had not immediately cancelled the said agreement. On the contrary it seems that on 4-2-1998 the defendant no.1 had written a letter to the plaintiff and had given him time till 30-6-1998 to make the payment as mentioned in the said MOU. So, till that time, the defendant no.1 had certainly condone the default committed by the plaintiff. However, that does not mean that subsequently also defendant no.1 had permitted the plaintiff not to make the payment. On the contrary it appears that the plaintiff did not pay the amount of Rs.29 lacs as agreed on one pretext or other and has in fact tried to justify the delayed payment by alleging that there was doubt about the title of the defendant no.1 and as such the payment was not made. It was also tried to be suggested that necessary documents of title

were not given by the defendant no.1 and as such also no payment was made by the plaintiff. However, if we peruse the said MOU we find that therein the plaintiff has in fact clearly admitted that he has taken inspection of all documents of title of the defendant no.1 and has satisfied himself about the title of the defendant no.1 to the suit property. In view of this admission in MOU now it does not lie in the mouth of the plaintiff to say that as he was having some doubt about the title, he did not make the payment. So, I am not inclined to accept the excuse given by the plaintiff for not making payment in time.

14. Though it is tried to be argued that the plaintiff has made the payment of Rs.1,40,000/- or odd to CIDCO on behalf of the defendant no.1 it must be noted that defendant no.1 has also contended that the said payment is in fact made by the defendant no.1 and she is in possession of the said receipt. Both the parties have not produced original receipt. Under the circumstances one is in fact not in a position to find out as to whether the said payment was actually made by the plaintiff or defendant. However, even if we assume for the sake of argument that the plaintiff has made the payment of Rs.1,40,000/- and odd still then that by itself is not sufficient. It is not known as to whether at the relevant time the defendant no.1 had in fact asked the plaintiff to make such payment or whether the

plaintiff with a view to keep the MOU alive made the said payment behind the back of defendant no.1.

15. It is an admitted fact that Sahara Corporation had filed suit against the plaintiff as well as the defendant no.1 and the said suit was compromised. It is also very clear that since the year 2001 the defendant no.1 had exhibited that she is not ready to perform her part of the said MOU. So, plaintiff, should have taken action against the defendant no.1 in that behalf immediately. But that has not happened. So, considering this aspect the suit for specific performance filed by the plaintiff prima facie appears to be time barred.

16. It is very clear that the plaintiff suppressed material facts from the Court.He did not bring it to the notice of the Court the result or the order passed in Writ Petition No.8179 of 2004. So, also the other suit which was filed by M/s Bhoomiraj. Thus, it is very clear that the plaintiff has not approached to the court with clean hands. Naturally, the plaintiff who has committed breach of the agreement in question and has not come to the Court with clean hands is not entitled to get discretionary relief of temporary injunction. For this purpose useful reference can be made to the observations made by the Apex Court in a case Gujarat Bottling Co. Ltd. and Ors. V/s Cocacola Co. and Ors.

(1995) 5 SCC 545. In this case the Apex Court has observed :-

> "Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and therefore, the Court, on being approached, will, apart from other consideration, also look to the conduct of the party invoking the jurisdiction of the Court,and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest".

17. There is another aspect of the matter. From the material on record prima facie it appears that the plaintiff has committed breach of the said MOU. So, under such circumstances he is not entitled to seek discretionary relief of specific performance.At the most he may claim damages. When such is the position, it can

be said that the loss that is likely to be caused to the plaintiff can be compensated in terms of money. So, considering this aspect also there is no necessity to grant temporary injunction as prayed. We cannot ignore the fact that though the plaintiff was expected to make payment of Rs.29 lacs within 75 days from the execution of the agreement, he did not do so and it is only in the year 2007 he has tried to make payment. So, the learned trial Judge has observed that prima facie it appears that plaintiff was in fact not ready and willing to perform his part of the contract. Considering all these aspects the learned trial Judge has rejected to grant temporary injunction as prayed. It is well settled that the appellate court should not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction. For this useful reference can be made to a case Wander Ltd. and Anr. V/s Antox India P. Ltd. 1990 (Supp) SCC 727.

18. Thus, having regard to the facts and circumstances of the case and the position of law, I do not find it necessary to interfere with the order passed by the learned trial Court.

19. In this view of the matter, there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)